

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/08/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LUE YOUSE, a single woman,) 1 CA-CV 10-0357
)
Plaintiff/Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
DAVID A. BIRDSELL, Receiver for)
Bonanza Land Co., L.L.C.;) Not for Publication -
BONANZA LAND CO., L.L.C., and) (Rule 28, Arizona Rules
Arizona Limited Liability) of Civil Appellate Procedure)
Company)
)
Defendants/Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-008443

The Honorable Joseph B. Heilman, Judge

AFFIRMED

HARPER LAW PLC Phoenix
By Kevin R. Harper
Attorney for Plaintiff/Appellant

POLSINELLI SHUGHART, P.C. Phoenix
By Marty Harper
Andrew S. Jacob
Attorneys for Defendants/Appellees

B A R K E R, Judge

¶1 Plaintiff Lou Youse appeals from the superior court's order granting Defendants' motion for summary judgment on her complaint against David A. Birdsell, receiver for Bonanza Land Company, and Bonanza Land Company for breach of contract and breach of the duty of good faith and fair dealing. Youse, Defendants' real estate agent, maintains that sufficient evidence exists from which a reasonable jury could find that Defendants owe Youse a commission on a property listed for sale through her. Because we disagree, we affirm.

Facts and Procedural History

¶2 We view the facts in a light most favorable to Youse. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998). This action arises out of a real estate listing agreement entered into by Youse and Defendants. The listing agreement came about as a result of a settlement in a previous lawsuit. Under the settlement agreement, Youse agreed to convey the subject property to Defendants. In return, Defendants granted Youse a year-long exclusive listing agreement for the property at a 10% commission rate.

¶3 The resulting listing agreement was entered on May 8, 2006, and provided that (1) Youse would not receive a commission until the property was sold, and (2) the sellers were permitted to adjust the listing price and sales terms as desired. The initial price stated in the listing agreement was \$17,422,500.

¶14 Almost immediately, Youse submitted an offer from Miller Holdings that, although for a lower price than the listing agreement, was "at or above market price." Defendants became aware of the offer towards the end of May. The offer was from a party who had purchased property from Bonanza previously and who had made timely payments. In early June, an attorney for one of the Defendants emailed Youse telling her that Defendants were "putting together a counteroffer now." Defendants did not actually submit a written counteroffer until August 15, 2006, after multiple inquiries from Youse and the buyer as to the status of the offer.

¶15 Two days later, the buyer responded. The sellers did not formally respond to the buyer until two months later in mid-October. The buyer then responded one day later. The buyer ultimately withdrew from negotiations in November due to changing market conditions. According to the potential buyer, "the delays were the sole reason the transaction failed to close." Youse does not allege that she presented the sellers with any other offers or that the sellers sold the property shortly after her listing agreement expired.

¶16 Youse brought the present suit against the seller to recover the commission that she would have earned from the sale had it closed. Prior to trial, Defendants filed a motion for summary judgment stating that no reasonable jury under the facts

presented would be able to find Defendants liable for Youse's commission. The court found in Defendants' favor, and Youse appealed. We have jurisdiction under Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

Discussion

1. Breach of the Duty of Good Faith and Fair Dealing

¶7 Youse asserts that the trial court erred in granting summary judgment because questions of material fact exist as to whether Defendants breached the listing agreement's implied and express¹ covenants of good faith and fair dealing. We review a trial court's grant of summary judgment de novo and view the evidence in the light most favorable to the non-moving party. *Espinosa v. Schulenburg*, 212 Ariz. 215, 216, ¶ 6, 129 P.3d 937, 938 (2006). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¹ The listing agreement included an express covenant stating that the seller "agrees to commit no acts which might tend to obstruct [Youse]'s performance hereunder." This wording reflects the covenant of good faith and fair dealing implied in every contract, therefore our analysis is the same under both the express and implied good faith provisions.

¶18 All contracts include an implied covenant of good faith and fair dealing. *Maleki v. Desert Palms Prof'l Props. L.L.C.*, 222 Ariz. 327, 333, ¶ 28, 214 P.3d 415, 421 (App. 2009). Under this covenant, a party to the contract may not impair the right of other parties to receive "the benefits that flow from their agreement or contractual relationship." *Kuehn v. Stanley*, 208 Ariz. 124, 132, ¶ 29, 91 P.3d 346, 354 (App. 2004). An act that exercises discretion granted under a contract, but for an improper purpose, can breach the covenant of good faith and fair dealing. *Sw. Sav. & Loan Ass'n v. SunAmp Sys., Inc.*, 172 Ariz. 553, 559, 838 P.2d 1314, 1320 (App. 1992). But acts that comply with the terms of the contract cannot, without more, be equated with bad faith because "[i]f contracting parties cannot profitably use their contractual powers without fear that a jury will second-guess them under a vague standard of good faith, the law will impair the predictability that an orderly commerce requires." *Id.* at 558, 838 P.2d at 1319.

¶19 Here, although Youse has shown evidence that the seller delayed in responding to the potential buyer's offer and counteroffers, this fact alone cannot support a finding of bad faith. See *Sw. Sav. & Loan*, 172 Ariz. at 559, 838 P.2d at 1320 (stating that acts in accord with contract cannot, without more, support a bad-faith finding). Youse has not produced any evidence to support a finding that the delay was for a bad-faith

purpose, such as an effort to avoid paying her commission. Youse has not, for example, presented facts showing that the seller sold the property shortly after her right to a commission expired, or that the seller was seeking to spitefully retain the property to deny her a commission. Indeed, to deprive Youse of a sale would deprive the seller of any proceeds. Further, as Defendants point out, Youse produced a buyer who may have been "ready, willing and able to purchase the property," but not "on the precise terms stipulated by the seller in his listing agreement." See *Demand v. Foley*, 11 Ariz. App. 267, 270, 463 P.2d 851, 854 (1970); see also *Barrett v. Duzan*, 114 Ariz. 137, 141, 559 P.2d 693, 697 (App. 1976).²

¶10 Youse relies on *Nuvest, S.A. v. Gulf & Western Industries, Inc.*, a Second Circuit Court of Appeals case holding

² Defendants assert that the failure to produce a ready, willing and able buyer "on the precise terms" in the listing agreement, *Demand*, 11 Ariz. App. at 270, 463 P.2d at 854, is dispositive and that no breach of the covenant of good faith and fair dealing can occur without that precondition. *Kuehn v. Stanley*, 208 Ariz. 124, 132, ¶ 29, 91 P.3d 346, 354 (App. 2004) (holding that an implied duty cannot "directly contradict an express contract term"). At least one hypothetical example, not pertinent here, comes to mind that would require us to examine whether that proposition holds in all circumstances. For example, rejection of an offer conveyed by the listing agent, but not "on the precise terms," when that same offer from the same buyer is accepted shortly after the listing agreement expires would require us to examine whether the asserted proposition should apply. We resolve this case on the grounds stated above and need not discuss whether a breach of the covenant of good faith and fair dealing can possibly occur without an offer "on the precise terms."

that a broker may recover a commission on a contract if an essential agreement on the sales contract has been reached and the defendant wrongfully or arbitrarily prevents completion. 649 F.2d 943, 949 (2d Cir. 1981). We find Nuvest distinguishable. There, the court affirmed a jury verdict in the broker's favor when the broker, Nuvest, presented evidence that the seller "purposefully effected an impasse by qualifying the [sales contract] terms *in order to avoid paying a finder's fee.*" *Id.* at 946 (emphasis added). For example, Nuvest presented evidence that the seller, when he learned of Nuvest's 5% fee, was "outraged (and) walked out of the room for a couple of minutes to calm down." *Id.* The seller had also said "I will show you how to sell a company without having anyone in between." *Id.* Here, Youse offers no similar evidence that the seller's delays were either intentional or for the purpose of avoiding paying her commission. Therefore, because no reasonable jury could find in Youse's favor, the trial court's grant of summary judgment is affirmed.

2. Request for Sanctions

¶11 Defendants request sanctions under Rule 25 of the Arizona Rules of Civil Procedure for this appeal stating that it is "frivolous" and "fails to raise any reasonable issue regarding a meritorious claim." See *Johnson v. Brimlow*, 164 Ariz. 218, 221-22, 791 P.2d 1101, 1104-05 (App. 1990). An

appeal is frivolous if it is "brought for an improper purpose or based on issues which are unsupported by any reasonable legal theory." *Id.* at 222, 791 P.2d at 1105. "[W]e do not impose sanctions lightly." *Id.*

¶12 Although Youse did not prevail on her appeal, we do not consider her arguments to be frivolous. There are simply insufficient facts to support them. Therefore, we hold that sanctions are inappropriate in this case.

Conclusion

¶13 For the reasons set forth above, the decision of the trial court is affirmed, and Defendants' request for sanctions is denied.

DANIEL A. BARKER, Presiding Judge

CONCURRING:

MARGARET H. DOWNIE, Judge

MICHAEL J. BROWN, Judge